IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 13/07/2006

CORAM

THE HON'BLE MR.JUSTICE P.D.DINAKARAN
and
THE HON'BLE MR.JUSTICE P.P.S.JANARTHANA RAJA

C.M.A.No.3067 of 2004

The Commissioner of Central
Excise, Central Excise
Commissionerate, Goubert Avenue,
Beach Road, Pondicherry. ...Appellant

-Vs-

1. Messrs.Southern Agrifurane
Industries Ltd.,
Mundiapakkam, Villupuram,
73, Armenian Street,
Chennai-1.

2. Customs, Excise and
Service Tax
Appellate Tribunal, Shastri
Bhavan Annexe, I Floor,
26, Haddows Road, Chennai-6. ... Respondent

Appeal filed under Section 35G of the Central Excise Act, 1944,
against the Final Order No.565 of 2004 dated 7.7.2004 on the file of the
Customs, Excise and Service Tax Appellate Tribunal, Chennai.

!For Appellant : Mr.K.Veeraraghavan
Senior Central Govt.
Standing Counsel

^For Respondent : Mr.Aravind Dattar
S.C. for Messrs.T.Shankararaman R 1

:JUDGMENT

(Delivered by P.D.DINAKARAN,J.)

The above appeal is directed against the Final Order No.565 of 2004
dated 7.7.2004 of the Customs, Excise and Service Tax Appellate Tribunal,
Chennai (for brevity 'CESTAT'), by the Revenue raising the following
substantial questions of law under the facts and circumstances stated

therein:-

a) Whether the Tribunal is correct in not considering the plea of limitation raised before it by way of miscellaneous petition ?

b) Whether the Tribunal is correct in placing reliance on a letter dated 23.7.96, which is an unauthenticated document ?

c) Whether the Tribunal is correct in ordering for the refund even in cases where there is cover-up and wrong representation of facts and when a party to the dispute is approaching the Authorities without clean hands and without properly considering the application of doctrine of unjust enrichment ?"

2.1. The brief facts of the case are as under: The first respondent (hereinafter will be referred to as 'the assessee') is a manufacturer of 'Furfuraldehyde' (hereinafter referred to as 'Furfural'), which was an input for bulk drugs. Furfural was exempted from duty of excise under notifications issued from time to time. One of these notification was Notification No.147/84-CE dated 18.6.84, which was withdrawn with effect from 1.9.91 by Notification No.35/91-CE. However, the assessee continued to clear the product without payment of duty, which necessitated the Department to issue a show cause notice dated 26.2.93 demanding duty from the assessee in respect of the clearances of Furfural for the period from 1.9.91 to 29.12.92. The assessee resisted the demand, but the original authority confirmed the demand by an order dated 9.9.93 demanding a sum of Rs.1,54,41,755/-. That apart, the authority also imposed a penalty of Rs.15 lakhs on the assessee under Rule 173Q.

2.2. Aggrieved by the said decision of the original authority dated 9.9.93, the assessee preferred an appeal before the Tribunal making a pre-deposit of Rs.40 lakhs as directed by the Tribunal. That appeal was also disposed of by an order dated 8.5.96 confirming the demand made by the original authority, viz., Collector of Central Excise, who reduced the quantum of penalty. As a result, the assessee paid the balance of duty on 23.7.96. However, the assessee filed an application for Rectification of Mistake of the order dated 8.5.96, which application was partly allowed by order dated 23.1.98, whereunder the demand of duty was restricted to the normal period of limitation. Thus, the assessee were held not liable to pay the duty beyond the normal period of six months preceding the date of issue of the show cause notice.

2.3. The assessee thus were eligible to apply for refund of duty. They, accordingly, filed an application on 25.2.98 before the Assistant Commissioner for refund. On receipt of such application, the respondent was served with a show cause notice on 21.5.98 to show cause why the cash refund should not be denied on the ground of unjust enrichment. Ultimately, the Assistant Commissioner, by order dated 8.12.99 , ordered a refund of an amount of Rs.1,05,62,041 to the first respondent. Hence, the Revenue preferred an

appeal before the Commissioner (Appeals), who by an order dated 20th October, 2000, set aside the order of the Assistant Commissioner and remanded the case to him with directions. After the remand, the Assistant Commissioner made enquiries, through the Central Excise officers having jurisdiction over them, with the assessee's customers, namely, (1) M/s.Indian Oil Corporation Ltd. (hereinafter will be referred to as 'IOC') and (2) M/s. Madras Refineries Ltd. (MRL), now Chennai Petroleum Corporation Limited (hereinafter will be referred to as 'MRL, now CPCL').

2.4. The first customer, namely IOC, by their letter dated 7.12.2000 stated that as per the records, supplies were exempted totally from payment of Central Excise Duty under Central Govt. Notification and hence, they have settled the full amount of bill value. Similarly, the second customer, namely, MRL, now CPCL, by their letter dated 5th February, 2001, replied to the effect that they did not pay any amount of excise duty by way of supplementary invoices in respect of the goods purchased from the respondent. Interpreting the letter of the IOC dated 7.12.2000 to the assessee, the Assistant Commissioner came to the conclusion that the IOC did not respond to the queries and accordingly, the Assistant Commissioner holding that the claim of the assessee was hit by doctrine of 'unjust enrichment', credited the amount to the Consumer Welfare Fund as per order dated 19.12.2001. Against which, the first respondent again preferred an appeal before the Commissioner (Appeals), who by an order dated 24.2.2003 held that the doctrine of unjust enrichment was not applicable to the facts of the case and allowed the appeal.

2.5. Against the said order dated 24.2.2003 of the Commissioner (Appeals), the Revenue preferred an appeal before the CESTAT, who by an order dated 7.7.2004, dismissed the appeal. Hence, the present appeal by the Revenue raising the above substantial questions of law.

3.1. With regard to the first question of law, viz., Whether the Tribunal is correct in not considering the plea of limitation raised before it by way of miscellaneous petition, as rightly held by the CESTAT, the question of limitation has already been rejected by the order of the Assistant Commissioner dated 19.12.2001 itself holding that " there cannot be a dispute on the part of time factor in preferring the claim by the assessee in the instant case". The said finding had become final as the revenue did not challenge the same. The Revenue, having accepted the finding, is not entitled to raise the same again, as rightly held by the CESTAT.

3.2. Hence, the first question of law is answered against the Revenue and in favour of the assessee.

4. With regard to the second question of law, viz., Whether the Tribunal is correct in placing reliance on a letter dated 23.7.96, which is an unauthenticated document, it is not in dispute that the first respondent accepted their balance excise duty to the tune of Rs.Rs.1,15,41,755/- only under protest by their let ter dated 23.7.96. The Revenue, having accepted the said impugned balance of excise duty, is not justified in saying that the said letter is an unauthenticated document. In any event, Mr.Veeraraghavan,

learned senior standing counsel is not disputing the fact that the letter dated 23.7.96 is duly signed by the authorised signatory of the first respondent. In any event, as held by the Apex Court in Mafatlal Industries Ltd. v. UOI [199 7 (89) ELT 247 (SC)], the duty paid during the pendency of any proceeding must be deemed to have been paid under protest and therefore, the procedure and limitation etc. will not apply to such cases. Hence, the second question of law is answered agaisnt the Revenue in favour of the assessee.

5.1. In regard to the third question of law, viz., whether the Tribunal is correct in ordering for the refund even in cases where there is cover-up and wrong representation of facts and when a party to the dispute is approaching the Authorities without clean hands and without properly considering the application of doctrine of unjust enrichment, we are obliged to refer the reply sent by IOC and MRL, now CPCL, which read as follows:-

1) Letter of the IOC Ltd.
Dated: 07/12/2000
M/s.Southern Agrifurane Industries
Ltd., A Division of South India
Corporation (Agencies) Ltd.,
36-40, Armenian Street,
Chennai-600 001.

Sub:- Supply of Furfural Dehyde

Dear Sir,

Refer your letter dated 11/11/2000, we regret to inform that till date we are yet to receive copies of the invoices as stated by you.

However, please find herewith a statement showing the list of invoices received by us from you against supply of Furfural Dehyde made by you against our orders during the year 1991-92. As per the records, it indicates that the supplies were exempted totally from payment of Central Excise Duty under Central Govt. Notification No.213-84 CE dated 31/10/1984 and hence we have settled your full amount of bill value as indicated in our enclosed statement. We are also enclosing a copy of the bill for your perusal.

Thanking you,
Yours faithfully,
For and on behalf of
Indian Oil Corpn.Ltd.

SD/-
A.K.Guha
Dy.Finance Manager

2) Letter of the MRL (now CPCL)
February 5, 2001

M/s.Southern Agrifurane Industries
(A Divn. Of South India Corporation
(Agencies) Ltd.), 36-40, Armenian
Street, Chennai-600 001.

Dear Sir,

Sub: Payment of Excise Duty through invoices for purchase
of Furfuraldehyde during the period from 1.9.1991 to
25.8.92.

Ref: Your letter dated February 2, 2000.

We refer to your above-cited letter.

We confirm that we had not paid any Excise Duty for the Furfuraldehyde purchased from you during the period from 1.9.1991 to 25.8.1992, as there is no provision in the Purchase Order for payment of Excise Duty. Please note we will not make payment of Excise Duty for the said period, even if you demand duty in future.

Thanking you,

Yours faithfully,
for CHENNAI PETROLEUM CORPORATION LTD.
sd/-
N.RAMAKRISHNAN
MANAGER (FINANCE-M&W)

5.2. Both the said letters have been referred in paragraph 1 of the order of the CESTAT. In fact, the Tribunal has referred to the letter of the MRL, now CPCL, dated February 5, 2001, that they did not pay any amount of excise duty by way of supplementary invoices. Similarly, with regard to the reply of the IOC, the Tribunal has also observed that the Assistant Commissioner had come to the conclusion that the IOC did not respond to the queries. The finding of the Assistant Commissioner in this regard with reference to the letter dated 7.12.20 01 of the IOC, in our considered opinion, is erroneous. What all the IOC has stated in the letter dated 7.12.2001 is that as per their records, the supply were exempted totally from the payment of excise duty and hence, they have settled the bill of the assessee fully as per the bill value, which would apparently mean that they have not paid the central excise duty. So, both the letters, viz., (1) the letter of the IOC dated 7.12.2000 and (2) the letter of MRL (now CPCL) dated 5.2.2001, would go to prove that the first respondent/assessee had not unjustly enriched by themselves. Therefore, we do not see any reason to conclude, as had been done by the original authority, that the assessee had not approached with clean hands and the claim of the first respondent is hit by the doctrine of unjust enrichment, inasmuch as both the customers had

clearly stated that they had not paid excise duty to the assessee. Hence, the third question is also answered against the Revenue and in favour of the assessee.

6. From the above facts and circumstances of the case, it is apparent that in spite of sufficient materials on record that the first respondent assessee had not unjustly enriched in making a claim as they have not received any excise duty from its customers, viz., IOC and MRL, now CPCL, both being the public sector undertakings, the Assistant Commissioner, in the order dated 19.12.2001, hastily and arbitrarily had come to the conclusion that the claim of the assessee for the refund of the excise duty paid is hit by doctrine of unjust enrichment and credited the sum of Rs.1,15,41,755/- to the Consumer Welfare Fund.

7. The act of the Assistant Commissioner in this regard is highly deprecated and therefore, while dismissing the appeal and answering all the questions in favour of the first respondent/assessee and against the Revenue, we award a sum of Rs.5,000/- as costs, with an observation that the Government is at liberty to collect the said amount of Rs.5,000/- awarded towards costs from the officer concerned. The Revenue is directed to refund the amount within 30 days from the date of receipt of copy of this order. While refunding the amount, the first respondent/assessee shall also satisfy the authorities that they are the unit of SICAL representing the respondent/assessee.

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To

The Registrar,
Customs, Excise and Service Tax
Appellate Tribunal, Shastri
Bhavan Annexe, I Floor,
26, Haddows Road, Chennai-6.